

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 6, 2008 Session

IN THE MATTER OF G.L.T.

**Appeal from the Juvenile Court for Franklin County
No. J04159 Thomas C. Faris, Judge**

No. M2008-00582-COA-R3-PT - Filed August 25, 2008

Tennessee Department of Children Services filed a petition in the Juvenile Court for Franklin County in March 2007 to terminate parental rights. The mother surrendered her parental rights in April 2007, but no adjudication as to the father was made because his whereabouts were unknown. Father was subsequently located and following a trial, the court terminated Father's parental rights based on his incarceration under a ten year sentence imposed when the child was under eight years old, and finding that termination was in the best interest of the child. Finding no error in the ruling of the juvenile court, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J, joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Glen A. Isbell, Winchester, Tennessee, for the appellant, W.M.T.

Robert E. Cooper, Jr., Attorney General and Reporter, and Amy T. McConnell, Assistant Attorney General, Nashville, Tennessee, for appellee, Tennessee Department of Children's Services.

OPINION

The child, G.L.T. (DOB 10/11/2005), came into Tennessee Department of Children Services/Appellee ("DCS")¹ custody on August 1, 2006, after the child's mother admitted to continued cocaine use. The original protective custody order pertained only to the mother because the alleged father (W.M.T./Appellant) was unknown at the time.

DCS first began working with the mother in November 2005 as a result of an investigation regarding the mother's drug habit, and the subsequent neglect, malnourishment, and medical maltreatment of the child. In July 2006, DCS received a second referral regarding the child, and

¹ The parties, Appellee/Tennessee Department of Children Services and Appellant/W.M.T., will be referred to herein as "DCS" and "Father," respectively.

upon investigation the mother admitted that she had been using cocaine since the last referral, and that her sister and brother-in-law, who had been living with her and the child, were using and dealing cocaine from her residence. On July 28 the mother's probation officer conducted a home visit and found the mother in violation of the terms of her probation, including testing positive for cocaine. Therefore, on August 1 DCS filed a petition for emergency temporary legal custody. Emergency protective custody was granted that day; following a hearing, an order was entered on August 29, 2006, granting temporary legal custody to DCS. A dependency and neglect adjudication hearing was set for September 20.

After obtaining temporary protective custody of the child, DCS developed a permanency plan with the mother, which was signed by the mother on August 27 and approved by the court on September 28, 2006. Father was not a party to this plan.

Some time between August 4 and August 29, Father's identity as the alleged father became known to DCS.² The August 29 order amended the dependency and neglect petition by joining Father as a party and ordering genetic testing. Father's whereabouts, however, remained unknown.

At the dependency and neglect adjudication hearing on September 20, the mother's counsel waived adjudication, and the court found the allegation of the petition to be true with respect to the mother; a final adjudication order was entered on October 11, 2006. Father was not present at the proceedings, and the court did not make any findings or adjudication with regard to Father. The child was placed with a maternal relative, a great aunt, to provide foster care. The child has remained with her great aunt since that time.

On August 10, 2006, Father was sentenced to ten years in prison in an Alabama penitentiary after pleading guilty to second-degree assault, which he had committed on or about February 14, 2005; Father's sentence was commuted to probation. On April 27, 2007, Father's probation was revoked for failing to report and failing to pay court ordered fees, and his ten year sentence was reinstated. He was incarcerated in Limestone County Jail in Alabama on that date and remained incarcerated at the time of trial.

The birth certificate of the child did not list a father, even though the mother told Father in August of 2005 that he was probably the child's father. Father admitted at trial that he believed he was probably the father; however, he took no steps when the mother told him of his alleged paternity or any time after the child's birth prior to his incarceration in April 2007 to establish parentage, or to support or visit the child. Prior to his incarceration, Father had no contact with the child.

² There is nothing in the record that explains how Father became identified between the time the child came into DCS custody on August 1, 2006, and the date of the preliminary hearing order of August 29, 2006. The mother never appeared in any court proceedings regarding the child. The DCS case worker who testified at trial did not become involved in the case until February 2007. She testified that the mother had identified W.M.T. to her as the alleged father in March 2007, but she did not know how Father became identified in the dependent and neglect preliminary hearing order of August 29, 2006. The record indicates that at the time of the preliminary hearing order Father was believed to be incarcerated in the Franklin County Jail; however, he was never there and the record does not indicate how DCS learned he was not there, nor does it indicate what, if any, efforts DCS made to find and notify Father of the dependency and neglect proceedings.

Father testified at trial that he did not know where the mother and child were living after the child's birth; however, he also testified that the mother had visited him in Alabama on several occasions after the child's birth, and he had asked her about the baby. The mother never took the child with her on any of her trips to Alabama. Father testified at trial that after he was incarcerated, he knew his attorney could help him locate the child, but he never asked for his attorney's assistance in establishing paternity or in finding the child.

DCS mailed a letter to Father's last known address in Athens, Alabama, on March 2, 2007. Father was not incarcerated at this time. The letter stated that the child had allegedly been born to a man named W.M.T., and that the mother's name was M.M.T; that the child had been placed with foster parents who wished to adopt the child; and requested Father contact DCS if he knew the mother and believed the child was his. DCS received no response to this letter.

A petition to terminate parental rights was filed by DCS on March 21, 2007, alleging grounds of no reasonable efforts, abandonment, non-payment of child support, the mother's non-compliance with the permanency plan, the father failing to make reasonable efforts to seek custody, the father failing to file a paternity petition, and allegations that the father posed a risk of substantial harm. On April 5 the mother surrendered her parental rights, but there was no adjudication regarding the father since his whereabouts remained unknown.

An Order of Publication was entered on May 7, 2007, and a hearing was set for June 25, 2007. Notice of the termination petition was published in The News-Courier based in Athens, Limestone County, Alabama on May 8, 15, 22, and 29, 2007. As a result of the publication, DCS located Father in Limestone County Jail.

DCS sent a letter to Father through the jail warden on May 14, 2007, stating that the mother had identified Father as the alleged father of the child and that the child was currently in DCS custody. The letter attached a "Waiver of Interest Affidavit" because DCS had been told by the mother that Father had made a statement to her that he did not want to claim the child even though there was a chance the child was his. The letter stated that if Father wished to waive his interest he should sign the form and return it to DCS. DCS was told by the Limestone County Jail warden by telephone that Father did not want to sign the waiver; Father was appointed counsel.

Father filed a motion for DNA testing on June 27, 2007, and an answer to the termination petition on July 6, 2007. On August 22, 2007, DCS filed an amended petition to terminate Father's parental rights on the grounds that he was sentenced to ten years incarceration when the child was under the age of eight. On November 21, 2007, an Order of Legitimation was entered declaring Father's paternity based on a DNA test with a 99.95% probability of paternity, and a new trial date on the termination petition was set for January 25, 2008.

At trial, the court found the following grounds for termination of parental rights: (1) the father's ten year incarceration while the child was under the age of eight pursuant to Tenn. Code Ann. § 36-1-113(g)(6); (2) abandonment pursuant to Tenn. Code Ann. § 36-1-113(g)(1); and (3) failure to legitimate the child pursuant to Tenn. Code Ann. § 36-1-113(g)(9) and Tenn. Code Ann. § 36-1-117(c). The court ruled that termination of Father's parental rights was in the best interest

of the child, finding that a change of care givers and physical environment would have a “devastating effect” on the minor child; that the child was loved and stable; and that the child was being provided for financially, emotionally, and medically. The court further found that Father could not provide this stability due to his incarceration, nor would he be likely to do so in the foreseeable future.

Father argues on appeal that the trial court should not have considered his incarceration in its decision to terminate his parental rights because he committed the underlying crime before the child’s birth, or alternatively, because he may be released prior to the full ten year term. Father also argues that there was not clear and convincing evidence to support a finding of abandonment or that termination of his parental rights was in the best interest of the child.³ Finally, Father argues that his due process rights were violated because DCS failed to locate and notify him when it obtained custody of the child and filed a dependency and neglect petition, and that DCS failed to make reasonable efforts to assist him in complying with the permanency plan.

We affirm the trial court’s termination of Father’s parental rights finding clear and convincing evidence that at least one statutory ground for termination exists, and that termination is in the best interest of the child. Because we have determined that the trial court correctly terminated Father’s parental rights based on Father’s ten-year sentence imposed when the child was eight years old or less, we do not find it necessary to address the other issues on appeal.

STANDARD OF REVIEW

Parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007), *cert. denied*, 168 L.Ed.2d 729 (2007). However, that right is not absolute and may be terminated in certain circumstances. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *State Dep’t of Children’s Services v. C.H.K.* 154 S.W3d 586, 589 (Tenn. Ct. App. 2004).

Terminating parental rights has the legal effect of reducing the parent to the role of a complete stranger and of severing forever all legal rights and obligations of the parent and of the child; and the parent shall have no right thereafter to have any relationship, legal or otherwise, with the child. Tenn. Code Ann. § 36-1-113(l)(1). The United States Supreme Court has recognized the unique nature of proceedings to terminate parental rights, stating that “[f]ew consequences of judicial action are so grave as the severance of natural family ties.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, (1996) (quoting *Santosky*, 455 U.S. at 787, (Rehnquist, J., dissenting)).

This court never takes the issue of terminating parental rights lightly and renders its decision only after intense examination of the facts and the law. Due to the grave consequences that accompany such decisions, courts must apply individualized decision-making to a termination decision. See *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). The court must first determine what standard of review must be applied. In accordance with Tenn. R. App. P. 13(d), this Court must

³ The parties to the appeal briefed all three grounds for termination, but at oral argument Appellee conceded that the only ground it was defending was Father’s sentence to ten years’ incarceration when the child was under eight years of age pursuant to Tenn. Code Ann. § 36-1-113(g)(6).

review each of the trial court's specific findings of fact *de novo* with a presumption of correctness unless the evidence preponderates otherwise. Then, the court must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *See Jones v. Garrett*, 92 S.W.3d 838 (Tenn. 2002); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

The statutes on termination of parental rights provide the only authority for a court to terminate a parent's rights. *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004); *In re Tiffany B.*, 228 S.W.3d 148, 155 (Tenn. Ct. App. 2007). Thus, parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). To support the termination of parental rights, only one ground need be proved, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

Because the decision to terminate parental rights affects fundamental constitutional rights and carries grave consequences, courts must apply a higher standard of proof when adjudicating termination cases. A court may terminate a person's parental rights only if (1) the existence of at least one statutory ground is proved by clear and convincing evidence and (2) it is shown, also by clear and convincing evidence, that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d at 808-09; *In re Valentine*, 79 S.W.3d at 546. "This heightened standard . . . serves to prevent the unwarranted termination or interference with the biological parents' rights to their children." *In re M.W.A.*, 980 S.W.2d at 622.

ANALYSIS

Grounds for Terminating Father's Parental Rights

Any one of the nine statutory grounds for termination of parental rights listed in Tenn. Code Ann. § 36-1-113(g) is sufficient to support an order terminating parental rights where termination is in the best interests of the child. *In the Matter of D.L.B.*, 118 S.W.3d at 367. Tenn. Code Ann. § 36-1-113(g)(6) permits initiation of a termination of parental rights proceeding where:

"the parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age *at the time the sentence is entered* by the court."

Id. (emphasis added).⁴

⁴ While the statutes governing dependent and neglected children reflect a preference for preserving families by reuniting parents and children whenever possible, the Department is not required in every case to preserve or repair (continued...)

Father does not challenge the juvenile court's finding that he is confined in a correctional facility under a sentence of ten years as a result of his guilty plea to second degree assault. Nor does he challenge the fact that the child was ten months old when the sentence was imposed. He argues, however, that because he committed the assault prior to the child's birth that the statutory ground should not apply to him. Alternatively, he argues that he may not be required to serve the entire ten year sentence and may be released as early as 2010; thus, the statutory ground should not be applied.

We find these arguments to be meritless. The statute unambiguously provides the relevant time period to be the date the sentence was imposed, not when the underlying crime was committed. *See* Tenn. Code Ann. § 36-1-113(g)(6). Father's alternative argument that he may be released early from his sentence does not provide him with relief either. Convictions and sentences are entitled to a presumption of correctness unless and until they have been set aside by a court of competent jurisdiction. This Court has repeatedly recognized that a court considering a petition for termination of parental rights based on Tenn. Code Ann. § 36-1-113(g)(6) need not look beyond the judgment of conviction and the sentence imposed by the criminal court in order to determine whether this ground for termination applies. *See, e.g., In re Audry S.*, 182 S.W.3d 838, 876 (Tenn. Ct. App. 2005); *In re Adoption of Copeland*, 43 S.W.3d 483, 489 (Tenn. Ct. App. 2000). The possibility of post-conviction relief is irrelevant to the consideration of whether the statutory criteria has been met. *In re M.L.P.* 228 S.W.3d 139 (Tenn. Ct. App. 2007) (*perm. app. den.* April 30, 2007).

Father has presented no other challenge to the juvenile court's reliance on Tenn. Code Ann. § 36-1-113(g)(6) as a ground for terminating his parental rights, and the court need only find one of the nine available statutory grounds by clear and convincing evidence to consider a petition for termination of parental rights. Accordingly, we affirm the juvenile court's finding that Father's parental rights may be terminated on the ground contained in Tenn. Code Ann. § 36-1-113(g)(6) if termination is in the best interest of the child.

Best Interest of the Child

To terminate parental rights, it is not only necessary to prove at least one of the grounds for termination, but the court must also prove by clear and convincing evidence that terminating the parent's rights is in the best interest of the child. *See* Tenn. Code Ann. § 36-1-113(c)(2). The best interest of the child is to be determined from the perspective of the child rather than the parent. *See White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004). Tenn. Code Ann. § 36-1-113(i) provides a noncomprehensive list of factors to be considered in determining whether termination of parental rights is in the best interest of the child:

⁴(...continued)

the parent-child relationship. *In re Tiffany*, 228 S.W.3d 148, 157 (Tenn. Ct. App. 2007). Termination proceedings initiated pursuant to Tenn. Code Ann. § 36-1-113(g)(6), as in this case, do not require the Department to make reasonable reunification efforts before filing a termination proceeding. *See In re C.C.M.*, 2004 WL 438326 at *6 n. 19 (Tenn. Ct. App. Mar. 9, 2004).

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5- 101.

Id.

In its order terminating Father's rights, the juvenile court made several findings of fact to support its finding that termination of Father's parental rights was in the best interest of the child. We have reviewed the record and find clear and convincing evidence that the trial court properly so found.

The court found that Father had not maintained regular visitation or other contact with the child, nor did he pay any child support. *See* Tenn. Code Ann. §§ 36-1-113(i)(3) and 36-1-113(i)(9). Father testified that the mother had told him that he was probably the father several months before the birth of the child. He further testified that he believed the child was his. Father was incarcerated

for approximately one month in 2005 before the child was born. Father was not incarcerated for 18 months after the child was born, yet he never visited nor in any meaningful way attempted to visit the child; and he never took legal steps to establish parentage. Father did not pay any expenses attendant to the birth of the child, nor did he pay any child support in the more than two years since the child's birth even though he testified that for at least a portion of that time he was employed and could have supported the child. Father testified that he had never seen or met the child and has no relationship with the child.

The court further found that Father had not established a meaningful relationship with the child and that a change of caregivers and physical environment would have a devastating effect on the child's emotional, psychological and medical condition. *See* Tenn. Code. Ann. §§ 36-1-113(i)(4) and 36-1-113(i)(5). Because he had not visited or otherwise acknowledged the child, Father never established a bond with her. The court found that the child was in a stable and supportive environment with her great aunt who provided all her emotional, financial, and special medical needs; that the child had a relationship with the great aunt since birth; and that the child had lived continuously with the great aunt since August 2006. The great aunt testified that she loved the child and would adopt her if allowed to do so. The court further found that the child was medically fragile and required weekly medical treatment, which the great aunt was facilitating.⁵ The court found that Father was not in a position to provide this invaluable and essential caretaker duty at the time and would not be able to do so in the foreseeable future. The record fully supports these findings.

Finally, the court found that Father was unable to make an adjustment of his circumstances that would lead to an early reunification or healthy and safe environment for the child. *See* Tenn. Code. Ann. § 36-1-113(i)(1). Father testified that prior to his incarceration he worked for a brick mason as a laborer for about one year. He also testified, however, that from 2001 through 2005 he was mostly unemployed performing only odd jobs on occasion. He speculated that he could work with a brick mason again or perform other odd jobs such as plumbing or painting upon his release from prison; however, he offered little proof as to how he would be able to provide for the child. The court found that Father had no physical environment for the court to consider regarding a healthy or safe home, or that there was one to be contemplated in the near future. Father offered no testimony or other proof of a current or future healthy and safe home. There was no proof, other than speculation, that the conditions of Father's future incarceration or continuing instability of employment would be remedied upon his release.

The juvenile court concluded that, taken together, the statutory factors contained in Tenn. Code Ann. § 36-1-113(i) supported the finding that termination of Father's parental rights was in the best interest of the child. Father has pointed to no other consideration that would undermine this conclusion. We have reviewed the record and find clear and convincing proof in support of the court's conclusion. From the perspective of the child, the only person she has ever had a meaningful relationship with is her great aunt who provides a stable and supportive home and ensures that the

⁵ The child was born with nonmalignant tumors in her arm that require weekly chemotherapy treatments at Vanderbilt University Medical Center.

young child receives her special medical treatment. Accordingly, we affirm the juvenile court's determination that terminating Father's parental rights is in the best interest of the child.

CONCLUSION

For the reasons set forth above, we affirm the juvenile court's findings that Father is incarcerated under a sentence of ten years that was imposed at the time the child was under the age of eight and that termination of Father's parental rights is in the best interest of the child; accordingly, we affirm the judgment terminating the parental rights of the father. Because we have found that Father's parental rights were properly terminated, the issues he raises regarding the dependency and neglect proceedings are moot.⁶ Costs are assessed to the Department of Children's Services, for which execution may issue, if necessary.

RICHARD H. DINKINS, JUDGE

⁶ A dependency and neglect proceeding is not a prerequisite to every termination proceeding, for example, one based on Tenn. Code Ann. § 36-1-113(g)(6); therefore, we need not examine the dependency and neglect proceedings here. We note, however, that even though Father was a named party in the dependency and neglect proceedings, the juvenile court made no findings of fact or adjudication regarding Father; thus, his constitutional rights were not violated.